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NO. 80-6878

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

MICHAEL GERALD VANDINBERG,

Appellart,

v.

STATE OF OREGON, et al,

Appellee,

On Appeal from the Supreme Court of Oregon

JURISDICTIONAL STATEMENT

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A. QUESTIONS PRESENTED

1. Whether under the Fourteenth Amendment an allegedly mentally deficient person may be committed indefinitely to the custody of the State Mental Health Department based soley on the individual's score on 'scientific' intelligence tests without a showing that the individual is either dangerous to himself or others or unable to provide for his basic personal needs.

2. Whether principles of double jeopardy or res judicata protect an allegedly mentally deficient person over 18 years of age from successive attempts to commit him based on his mental condition prior to the age of 18.

B. PARTIES TO THE PROCEEDING

Michael Gerald Vandenberg

State of Oregon

John Vandenberg

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D. REFERENCE TO REPORTED OPINIONS BELOW

The only opinion rendered below was that of the Oregon Court of Appeals in the case of In the Matter of Michael G. Vandenberg, Alleged to be Mentally Deficient, State ex rel John Vandenberg v. Michael Gerald Vandenberg, 48 Or App 609, 617 P2d 675, a copy of which is included as Appendix B.

Copies of the unreported orders of the Oregon Supreme Court denying review and denying rehearing are also attached as appendices.

E. GROUNDS OF JURISDICTION

1. This is a civil mental commitment proceeding. Appellant's commitment was sought and obtained on the basis of his alleged mental deficiency.

2. Appellant was committed by the trial court on August 14, 1979. That decision was affirmed by the Oregon Court of Appeals on October 6, 1980. Appellant's Petition for Review to the Oregon Supreme Court was denied on February 4, 1981. Appellant's Petition for Rehearing was denied by the Oregon Supreme Court on March 17, 1981. The Notice of Appeal was filed June 15, 1981, in the Oregon Supreme Court.

3. Jurisdiction is conferred on this Court by 28 USC Section 1257(2).

F. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS AT ISSUE

United States Constitution, Amendment XIV

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Oregon Revised Statutes, Section 427.015:

> Petition for Commitment of Mentally Deficient Person. The judge of any probate court or, if the Circuit Court is not the probate court, the Circuit Court if its

jurisdiction has been extended to include commitment of the mentally deficient pursuant to ORS 3.275 may, upon written petition of any citizen, alleging that any person is mentally deficient and by reason thereof is need of care, custody or training, cause such person to be brought before him at such time and place as he may direct.

ORS 427.025. Precommitment examination required; examination facilities. (1) If, after receiving a petition for commitment and viewing the person alleged to be mentally deficient, the judge considers the person to be in need of care, custody or training, he shall order a precommitment physical and mental examination of the person at a facility or institution as provided is subsection (2) of this section. No person shall be committed to the Mental Health Division as mentally deficient without a precommitment examination.

ORS 427.045. Report of findings; recommendations. (1) The facility or institution which makes the examination under ORS 427.025 shall report its findings to the court within 30 days of completion of the examination. These findings shall indicate whether the person is mentally deficient, and recommend the type of treatment which is in the best interest of the person, his family and the community.

ORS 427.059. Certification of mental deficiency; order of commitment; copy to division. (1) If the findings of the examining facility or institution are that the person is mentally deficient, the judge may certify that the person is mentally deficient. If he certifies that the person is mentally deficient he may order the person commited to the Mental Health Division.***

Oregon Administrative Rules 309-42-000

"(1) Purpose. This rule prescribes criteria for voluntary admission to a state institution for the mentally retared and criteria for the examining authority's recommendation to a court on commitment of a person alleged to be mentally retarded to the Mental Health Division...

(2) Statutory Authority and Procedure. This rule is authorized by ORS 430.041(1) and carries out the provisions of ORS Chapter 427.

(3) Definitions. As used in this rule:

... (c) 'Mental retardation; means significantly subaverage intellectural [sic] functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Persons of borderline intelligence may be considered mentally retarded if there is also serious impairment of adaptive behavior. Definitions and classifications shall be consistent with the 'Manual on Terminology and Classification in Mental Retardation' of the American Association on Mental Deficiency, 1977 Revision. Mental retardation is synonymous with mental deficiency:

(A) 'Adaptive behavior' means the effectiveness or degree with which an individual meets the standards or personal independence and social responsibility expected for age and cultural group.

(B) 'Developmental period' means the period of time between birth and the 18th birthday.

(C) 'Intellectual functioning' means functioning as assessed by one or more of the individually administered general intelligence tests developed for that purpose.

(D) 'Significantly subaverage' means a score on a test of intellectual functioning that is two or more standard deviations below the mean for the test...

(4) Admission Criteria. Before the name of a person whose application form has been approved is placed on the waiting list for admission to a state institution for the mentally retarded, or before an examining authority may recommend to a court the commitment of an allegedly mentally retarded person to the Mental Health Division, the diagnosis and Evaluation Service of the Division shall determine that:

(a) An examining authority has found the person to be mentally retarded based upon the 'Manual on Terminology and Classification in Mental Retardation" of the American Association on Mental Deficiency, 1977 Revision, including a comprehensive evaluation covering physical, social and cognitive factors and considering past and present behavior of the person. In addition to those persons' meeting the AAMD definitions, the manual allows that persons who score in the borderline range (IQ 70-79) on tests of intellectual functioning may be diagnosed mildly retarded if their adaptive behavior is in the retarded range, unless the examiner can definitely attribute the adaptive deficits to such factors as mental or emotional disturbance, sensory impairments or other such variables.

(b) Admission to a state institution for the mentally retarded is determined to be the optimal available plan and is in the best interest of the person and the community...."

G. STATEMENT OF THE CASE

On September 22, 1978, a petition alleging the mental deficiency of Michael Gerald Vandenberg, then 19 years old, was filed in the Marion County Circuit Court. Court appointed examiners concluded defendant was not mentally deficient and following a hearing on October 31, 1978, the Court dismissed the petition. On June 21, 1979, an identical petition was refiled.

The petition alleged that the defendant was "a mentally deficient person and by reason thereof is in need of care, custody and training in an institution for the mentally deficient."

A second court ordered examination was undertaken, which concluded that defendant was mentally deficient. Following a hearing the trial court entered a order providing:

> "This Court finds and certifies that said Michael Gearld Vandenberg is a mentally deficient person and that by reason thereof is in need of care, custody or training and should be committed to an institution for the mentally deficient."

The Court made no finding that appellant was dangerous or unable to care for himself, nor did the evidence support such a finding.

Prior to the evidentiary hearing in the trial court defendant filed a Demurrer which alleged that the commitment procedure violated the United States Constitution, Amendment XIV in that the term mental deficiency was vague and overbroad. The defendant also moved to dismiss the proceeding on the grounds of double jeopardy and res judicata based on the Circuit Court's previous dismissal of the same petition. The trial court overruled the demurrer and denied the Motion to Dismiss.

On appeal the defendant again alleged in his brief that the commitment procedure was unconstitutionally vague and overbroad by its allowance of commitment without a showing that the allegedly mentally deficient person was dangerous to himself or others. The appellate court concluded in its opinion that the challenged procedure suffered from no constitutional infirmities.

Following appellant's commitment the Oregon Legislature amended the statutory procedures at issue. The amended provisions now require a showing of dangerousness to self or others and provide for the periodic review of persons committed.

H. SUBSTANTIALITY OF QUESTIONS PRESENTED

In O'Connor v. Donaldson, 422 US 563, 95 SCt 2486, 45 LEd2 396 (1975) this Court, per Justice Stewart, declared:

> "A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonable precise content and that the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom." 422 US at 575.

The principle that 'dangerousness to self or others' is an essential element of any constitutional involuntary commitment would thus seem to be well established.

The development of the law of involuntary mental commitment has been such, however, that the Court has never had the opportunity to apply that principle in the context of a due process challenge to a civil commitment statute. Consequently, a review of both this case and the variety of present state commitment proceedings for the mentally deficient reveals that the apparent holding of O'Connor v. Donaldson is generally honored in the breech.

Three years before O'Connor the Court noted in Jackson v. Indiana, 406 US 715 (1972):

> "The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States ... The bases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training. Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.
>
> "We need not address these broad questions here." 406 US 736-737.

The remarkable lack of litigation as to the substantive limitations of a State's involuntary commitment powers has continued to the present, as is apparent from the three mental commitment cases following Jackson v. Indiana.

Addressing itself in O'Connor v. Donaldson, supra, 422 US at 573, to the "single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty" the Court noted that "... this case involves no challenge to initial commitment." 422 US at 567. Subsequently in Addington v. Texas, 441 US 418, 99 SCt 1804, 60 LEd2 323 (1979) the Court was confronted with a standard of proof question in a mental commitment proceeding, again a case in which it was "clear that no challenge to the constitutionality of any Texas statute was presented." 99 SCt at 1807. In Parham v. J. R., 442 US 584, 99 SCt 2493, 61 LEd2 101 (1979) the Court considered the due process requirements of a voluntary commitment scheme for children.

In the case of Youngberg v. Romeo, No. 80-1429, in which review was recently allowed the issue relates to the existence

of a constitutional right to treatment for a retarded person already commited -- a troublesome issue left inresolved by O'Connor, but one which is unlikely to illuminate the standards for commitment in the first instance.

The uncertainty associated with the dearth of case law regarding the requirements of constitutional civil commitment and concomitant confusion has been widely discussed. The obeservations, for example, of a study relied on by the Court in Jackson v. Indiana, supra, 406 US 715, 736, "The Mentally Disabled and the Law" (revised edition, 1971), American Bar Foundation, Brakel and Rock, eds., remain equally appropros today:

> "The solution to this problem would appear to be a sound and discriminating definition not only of mental illness but also of the circumstances under which compulsory hospitalization is appropriate. However, no existing definition of mental illness and of the legal criteria for involuntary hospitalization meets this standard, nor is one likely to be forthcoming. This fact has been recognized in much of the recent legislation governing hospitalization." ABF Study page 60

In its conclusions and recommendations the report continues:

> "1) Efforts to develop a clear and workable statutory definition of the degree of mental illness which justifies involuntary hospitalization should continue. Statutory language is generally so ambiguous that it is difficult to determine the threshold degree of mental illness that justifies involuntary hospitalization." ABF Study pp 61-62.

It should be noted that the problems associated with "mental illness" are at least, if not more troubling in the closely related context of "mental deficiency," where states have generally provided even scantier legislative guidance. While such statutory provisions as Michigan's Comp. Laws Ann. 1967 Section 330.54:

> "The term 'mentally handicapped' shall include morons, idiots, imbeciles and those as to whom congenital defects have produced the same deficiency..."

have generally been amended, the alternatives which have evolved are plainly not altogether free from their own vagueness and overbreadth. The Oregon definitions at issue (which remain the same following that state's amendment to its commitment scheme) seem even more definite, for example, than those provided by present Iowa law, Iowa Code Ann. 1969,Section 222.2.4:

> "'Mental retardation' or 'mentally retarded' means a term or terms to describe children and adults who as a result of inadequately developed intelligence are significantly impaired in ability to learn or to adapt to the demands of society."

Such non-adaptive Iowans may be committed if

> "...it will be conducive to the welfare of such person and of the community to place the person under guardianship, or to commit the person to some proper institution for treatment, training, instruction, care, habilitation, and support..."

The present law of Georgia provides:

> "Mental retardation means a state of subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior." Ga Code Ann. 1963,Section 88-2502(a)

A person of such subaverage intellectual functioning may be committed if he or she is "in need of additional care, training, education or other specialized services." Section 88-2504(4)(f).

The principal problem with the Oregon statute at issue and the numerous other state statutes of which it is typical is that they allow the commitment of a person "in need of care," or "in need of training." Those terms are simply too broad, since virtually every citizen could benefit from some 'training' be it in physical proficiency, occupational skills, interpersonal relations or any of a wide variety of other areas of contemporary social intercourse. These statutes have evolved from an assumption that certain people obviously cannot function in society, an assumption undoubtedly true in many instances but one that fails to protect individuals from ad hoc and biased treatment borne of the discomfort among 'normal' people frequently engendered by contact with those mentally 'different.' See O'Connor v. Donaldson, supra, 422 US 575.

The Oregon commitment procedure now before the Court provides an excellent opportunity for developing the law in this important area of individual liberty not only because the issue has been clearly raised and preserved, but because the statutory scheme may justifiably be categorized as second generation. That is, the statute transcends the formerly typical 'feeble minded,' 'moron,' 'imbecile' language in a principled attempt to define

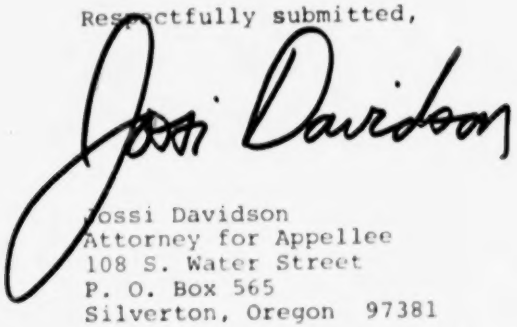
mental retardation in a useful manner. That definition is one promulgated by the American Association on Mental Deficiency and which can be expected to become increasingly widely adopted. See for example the Georgia definition supra. Whether the definition achieves the 'reasonably precise content' and 'reasonable accuracy' required by O'Connor, supra, 422 US at 575 is one major question. Equally important, however -- even assuming the constitutional validity of the definition -- is whether such statutes adequately protect the right of an otherwise capable individual to "prefer his home to the comforts of an institution." O'Connor, supra, 422 US at 575.

The present case also presents interesting and important issues arrising from the assumed permanance of mental deficiency. Since that condition, unlike mental illness, is definitionally required to have been established before the age of 18 years (the developmental period) for example, is an individual afforded any protection from successive attempts to commit him once it has been determined that he was not mentally deficient during that period? Also, is an allegedly mentally deficient person denied equal protection of the laws when the procedures for determining his condition and subsequent treatment differ from those governing the treatment of allegedly mentally ill persons, as they do under the law of Oregon and many other states? A further issue involves the propriety of the Oregon appellate court's express reliance on Parham v. J. R., supra, to support the holding that the challenged involuntary commitment procedure is constitutional (p 6a) since Parham involved a voluntary commitment scheme and is thus wholly inapposite.

While such other issues are raised by the present case, their decision is definitely ancillary to the major constitutional question discussed above. The existence of such further issues

is simply indicative of the vast uncertainty which continues to afflict the area of involuntary civil commitment.

Respectfully submitted,



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Appendix A

Mental Deficiency Commitment--5

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION (FOR [illegible] COUNTY)

Probate Court

FILED

IN THE MATTER OF)
MICHAEL GERALD VANDENBURG)
A Mentally Deficient Person)

CERTIFICATION OF MENTAL DEFICIENCY AND ORDER OF COMMITMENT
No. 1150

MAR 31 11 04 '80

A pre-commitment physical and mental examination having been duly made of Michael Gerald Vandenburg at Diagnostic & Evaluation Center (approved facility) pursuant to order of this court, entered on the 27th day of June, [illegible], and the facility having reported to this court its findings that said MICHAEL GERALD VANDENBURG is a mentally deficient person; and due proceedings and deliberation have been had, this court

FINDS AND CERTIFIES that said MICHAEL GERALD VANDENBURG is a mentally deficient person and that by reason thereof is in need of care, custody or training and should be committed to an institution for the mentally deficient; and it is

ORDERED that said MICHAEL GERALD VANDENBURG is hereby committed by the Mental Health Division of the State of Oregon for an indeterminate period of detention, and after receipt of notice from the institution that there is room for the said person, that he be thereupon placed in the custody of the aforesaid institution, as provided by statute

IT IS FURTHER ORDERED that there be furnished to the Mental Health Division, as required by ORS 427.090, all available information concerning the person committed by this order except such information as shall have been furnished previously.

Date this 14th day of August, 19 79.

Circuit Judge

(over)

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Appendix B

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of
Michael Gerald Vandenberg,
Alleged to be Mentally Deficient,

State of Oregon, ex rel
John Vandenberg,

Respondent,

v.

No. 1158
CA 15533

Michael Gerald Vandenberg,

Appellant.

****

Appeal from Circuit Court, Marion County.

Clarke C. Brown, Judge.

Argued and submitted July 14, 1980.

Jossi Davidson, Silverton, argued the cause and filed the brief for appellant.

Richard M. Botteri, Portland, argued the cause and filed the brief for respondent.

James C. Rhodes, Assistant Attorney General, Salem, waived appearance for State of Oregon.

Before Gillette, Presiding Judge, and Roberts and Campbell, Judges.

ROBERTS, J.

Affirmed.

FILED OCTOBER 6, 1980

DVAN

ROBERTS, J.

This case presents a challenge to commitment proceedings for mental deficiency under former ORS ch 427.[1] Defendant challenges the constitutionality of the commitment procedure, and argues that principles of double jeopardy and res judicata are applicable to this case. He further contends that the standard of proof required in the commitment hearing was proof "beyond a reasonable doubt" and that this standard was not met.[2]

The trial court overruled defendant's demurrer alleging the vagueness of the underlying statute and denied a motion to dismiss based on a previous commitment proceeding. We affirm the certification of mental deficiency and order of commitment.

Defendant is a 21-year-old man first admitted voluntarily to Fairview Hospital and Training Center at the age of 17. He was a resident there from August to November, 1976, and was again voluntarily admitted in February of 1977. In August, 1977, defendant turned 18, and was evaluated pursuant to former ORS 427.250 to determine whether he was still mentally deficient and in need of further residential care, treatment, training or education. The two psychologists who examined defendant in the spring and summer of 1978 found him not to be mentally deficient.

Fairview's chief medical officer disagreed and filed a petition on behalf of the Mental Health Division alleging defendant was mentally deficient and in need of care and treatment. A full hearing was held in October, 1978. This proceeding was dismissed by the trial court when the representative of the Fairview Hospital administration testified it was the institution's position that defendant was not mentally deficient.[3]

In March, 1979, defendant entered a residential group home in Portland. He reportedly had behavioral problems there, including failure to take medication to control his epileptic seizures, stealing money, failure to attend a work program or keep specified hours, and running away. Defendant's father then filed a petition to commit him to the Mental Health Division, pursuant to former ORS 427.015. A precommitment examination was ordered, and defendant was found to be mentally deficient. The recommendation by the examining institution, Fairview Hospital, was that defendant be returned to its care. The trial judge certified that defendant was mentally deficient and ordered his commitment to the Mental Health Division in August, 1979.

Defendant alleges that the statutory procedure under which he was committed, former ORS 427.015 et seq, was unconstitutionally vague and overbroad in that no definition of "mental deficiency" was contained in the statute. However,

in commitment of the mentally deficient, the court does not play the same fact-finding role that it does in commitment of the mentally ill under ORS ch 426. In commitment of the mentally ill the court is empowered to "determine" (ORS 426.130) whether a person is

> "(2) * * * because of a mental disorder * * * either
>
> "(a) [d]angerous to himself or others; or
>
> "(b) [u]nable to provide for his basic personal needs and is not receiving such care as is necessary for his health or safety.
>
> "* * * * *." ORS 426.005(2)(a) and (b).

Statutes for the commitment of the mentally ill, when strictly construed, were held not to be unconstitutional on the grounds of vagueness in State v. O'Neill, 274 Or 59, 66, 545 P2d 97 (1976), the Supreme Court noting that the state has a legitimate interest in providing care and assistance to the unfortunate.[4]

In commitment proceedings for the mentally deficient, the standard for commitment is set by scientific tests monitoring levels of intellectual functioning and adaptive behavior. This fact-finding authority was vested in the Mental Health Division. ORS 430.041(1). Under the former statute, the court was authorized to "certify" a person as mentally deficient only after the examining institution had so found.

A statutory and administrative scheme for the

involuntary commitment of minors by their parents in the state of Georgia was recently found by the United States Supreme Court to be constitutionally sound. Parham v. J. R., 442 US 584, 99 S Ct 2493, 61 L Ed 2d 101 (1979). In Parham, the Georgia statute allowed for a determination by the superintendent of each institution as to whether a child showed evidence of mental illness and should be admitted. There were no administrative regulations defining procedures the superintendents should use in making such a determination. The Supreme Court held the lack of regulations did not vest unbridled discretion in the admitting physicians, even where procedures differed from institution to institution.

Unlike the Georgia scheme, Oregon's former commitment statute for mental deficiency was supplemented by detailed administrative rules which provided a standard for finding a person mentally deficient.[5] In addition, former ORS 427.059 and 427.062 provided for judicial review of the administrative finding, and an adversary hearing, including the appointment of counsel. Oregon's commitment scheme thus vastly exceeds the procedural safeguards accepted by the United States Supreme Court in Parham. We hold that under the standards of Parham and O'Neill, former ORS 427.015 et seq was neither constitutionally vague nor procedurally infirm and did not violate defendant's rights under the Fourteenth Amendment to

the United States Constitution.

The trial court's denial of a motion to dismiss on the ground of a previous proceeding was proper. Defendant's contentions that double jeopardy or res judicata operate as a bar to two consecutive mental commitment proceedings have no merit. First, a mental commitment proceeding, though it involves a serious deprivation of liberty, is not a criminal proceeding. State v. O'Neill, supra, 274 Or at 72. Thus the principle of double jeopardy has no application.

The principle of res judicata likewise has no application in this particular case. In order for the doctrine of res judicata to apply, the prior lawsuit must have ended in an adjudication of issues which culminated in a final decree. McAllister v. Charter First Mortg., Inc., 279 Or 279, 285, 567 P2d 539 (1977), Huszar v. Certified Realty Co., 272 Or 517, 523, 524, 538 P2d 57 (1975). Defendant's prior commitment proceeding was dismissed by the court, without findings, after an administrative determination that the defendant was not mentally deficient. See n 3, infra.

At the close of the testimony in the August, 1979, hearing, the trial judge found he had been convinced beyond a reasonable doubt that the defendant suffered from mild mental retardation. We believe this was the proper standard to apply and we believe it was met.

Prior to the 1979 revisions, ORS ch 427 did not specify any standard of proof for a determination of mental deficiency. Since, however, the deprivation of liberty involved in a commitment for mental deficiency is at least as great as that in mental illness,[6] the standard the court should have used in evaluating evidence relied upon by Fairview should have been that required for commitment as a mentally ill person. The standard then was proof "beyond a reasonable doubt."[7]

In determining whether this standard of proof was met, we review de novo as in commitments of the mentally ill. State v. O'Neill, supra, State v. Arnold, 36 Or App 869, 586 P2d 93 (1978). However, substantial weight is accorded the findings of the trial court, which had an opportunity to observe and question the defendant. State v. Watkins, 35 Or App 87, 581 P2d 90 (1978).

Under OAR 309-42-000(3)(c), certification for mental deficiency requires a showing of three elements: (1) a significantly subaverage performance on general intelligence tests, (2) a failure to meet the standards of personal independence and social responsibility expected for the age and cultural group, and (3) manifestation of these conditions during the time period before the subject's 18th birthday.

The record below, which incorporates the transcript from the October, 1978 hearing, shows that five doctors testified

as to defendant's condition. A physician, a psychiatrist and two psychologists testified that defendant's IQ was significantly subaverage. His adaptive behavior was found to be impaired by every doctor except the two psychologists who examined defendant before his discharge from Fairview and the behavioral incidents which took place thereafter, during defendant's stay at the Portland group home. Thirdly, defendant was diagnosed as retarded on three separate occasions before his 18th birthday. This places the first recognition of defendant's condition within the developmental period.

The evidence established beyond a reasonable doubt that defendant suffers from mild mental retardation. The certification of mental deficiency and order of commitment were proper. We affirm.

Affirmed.

FOOTNOTES

1

Defendant's involuntary commitment pursuant to former ORS 427.059 was the result of an action commenced in June, 1979. That portion of chapter 427 dealing with commitment procedure was repealed and replaced by Oregon Laws 1979, ch 683, which took effect October 3, 1979.

2

Defendant also argues that the judge below erred in failing to allow defense counsel's closing argument. The record shows, however, that at the close of testimony, the court asked counsel for both parties if there would be "anything further," to which defense counsel replied, "We have nothing." The judge then made his ruling. Whatever misunderstanding this may evidence, defense counsel made no objection at the time. This alleged error is thus not properly before us. Liberty Mutual Fire Ins. v. Hubbard, 275 Or 567, 551 P2d 1288 (1976), Weber v. Kamyr, Inc., 269 Or 617, 634, 525 P2d 1307 (1974).

3

Former ORS 427.059(1) provided:

"(1) If the findings of the examining facility or institution are that the person is mentally deficient,

the judge may certify that the person is mentally deficient. If he certifies that the person is mentally deficient, he may order the person committed to the Mental Health Division."

The trial judge concluded that he had no independent authority to make a finding of mental deficiency where the examining institution had declined to do so.

4

Citing O'Connor v. Donaldson, 422 US 563, 95 S Ct 2486, 45 L Ed 2d 396 (1975).

5

OAR 309-42-000 provides in pertinent part:

"(1) Purpose. This rule prescribes criteria for voluntary admission to a state institution for the mentally retarded and criteria for the examining authority's recommendation to a court on commitment of a person alleged to be mentally retarded to the Mental Health Division. This rule also prescribes a procedure for the release of certain residents from state institutions for the mentally retarded.

"(2) Statutory Authority and Procedure. This rule is authorized by ORS 430.041(1) and carries out the provisions of ORS Chapter 427.

"(3) Definitions. As used in this rule:

"(a) 'Division' means the Mental Health Division of the Department of Human Resources.

"(b) 'Examining authority' means the Diagnosis and Evaluation service of the Mental Health Division or any facility designated by the Diagnosis and Evaluation Service to act as an examining authority for the purpose of this rule.

"(c) 'Mental retardation' means significantly subaverage general intellectural [sic] functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period. Persons of borderline intelligence may be considered mentally retarded if there is also serious impairment of adaptive behavior. Definitions and classifications shall be consistent with the 'Manual on Terminology and Classification in Mental Retardation' of the American Association on Mental Deficiency, 1977 Revision. Mental retardation is synonymous with mental deficiency:

"(A) 'Adaptive behavior' means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for age and cultural group.

"(B) 'Developmental period' means the period of time between birth and the 18th birthday.

"(C) 'Intellectual functioning' means functioning as assessed by one or more of the individually administered general intelligence tests developed for that purpose.

"(D) 'Significantly subaverage' means a score on a test of intellectual functioning that is two or more standard deviations below the mean for the test.

"(d) 'State institution' means Fairview Hospital and Training Center and Eastern Oregon Hospital and Training Center of the Mental Health Division or any other Mental Health Division facility that accepts transferees from these two institutions.

"(4) Admission Criteria. Before the name of a person whose application form has been approved is placed on the waiting list for admission to a state institution for the mentally retarded, or before an examining authority may recommend to a court the commitment of an allegedly mentally retarded person to the Mental Health Division, the diagnosis and Evaluation Service of the Division shall determine that:

"(a) An examining authority has found the person

> to be mentally retarded based upon the "Manual on Terminology and Classification in Mental Retardation' of the American Association on Mental Deficiency, 1977 Revision, including a comprehensive evaluation covering physical, social, and cognitive factors and considering past and present behavior of the person. In addition to those persons' meeting the AAMD definitions, the manual allows that persons who score in the borderline range (IQ 70--79) on tests of intellectual functioning may be diagnosed mildly retarded if their adaptive behavior is in the retarded range, unless the examiner can definitely attribute the adaptive deficits to such factors as mental or emotional disturbance, sensory impairments, or other such variables.
>
> "(b) Admission to a state institution for the mentally retarded is determined to be the optimal available plan and is in the best interest of the person and the community. * * *
>
> "* * * * * *."

6

Under old and new ORS ch 426, committees for mental illness have their status reviewed every 180 days. There was no comparable provision for the mentally deficient under former ORS ch 427.

7

Former ORS 426.130. We note that the standard for commitment under both chapters was made the same and changed to "clear and convincing evidence" by the 1979 amendments. ORS 426.130, 427.290. This is in keeping with the United States Supreme Court's holding in Addington v. Texas, 441 US 418, 99 S Ct 1804, 60 L Ed 2d 323 (1979).

Appendix C

SUPREME COURT COURT of APPEALS

ELIZABETH D. BELSHAW
State Court Administrator
378-6046

ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

Telephone Area Code — 503
Re Cases on Appeal 378-6025
Legal Counsel 378-6022
Oreg. Reports Editor 378-2832

February 4, 1981

Jossi Davidson
Attorney at Law
108 S. Water Street
Silverton, Oregon 97381

Re: State of Oregon, ex rel, Vandenberg v. Vandenberg
CA 15533 SC 27427

Dear Mr. Davidson:

The Supreme Court today denied appellant's Petition for Review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

Marilyn Hartley

Marilyn Hartley
Supreme Court Calendar Clerk

MH/np
cc: Richard M. Botteri

Appendix D

SUPREME COURT COURT of APPEALS

ELIZABETH D. BELSHAW
[redacted]
State Court Administrator
378-6046

ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

Telephone Area Code — 503
Re Cases on Appeal 378-6025
Legal Counsel 378-6022
Oreg. Reports Editor 378-3832

March 17, 1981

Jossi Davidson
Attorney at Law
108 S. Water Street
P.O. Box 565
Silverton, Oregon 97381

Re: State of Oregon, ex rel Vandenberg v. Vandenberg
CA 15533 SC 27427

Dear Mr. Davidson:

The Supreme Court today denied appellant's Petition for Reconsideration in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

Very truly yours,

Marilyn Hartley

Marilyn Hartley
Supreme Court Calendar Clerk

MH/np
cc: Richard M. Botteri

Appendix E

FILED
June 15, 1981
(continued
by tel.)

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of MICHAEL GERALD VANDENBERG, Alleged to be Mentally Deficient,	)	
STATE OF OREGON, ex rel, JOHN VANDENBERG,	)	Trial Court No. 1158
Plaintiff-Respondent,	)	Appellate Court No. 15533
v.	)	
MICHAEL GERALD VANDENBERG,	)	Supreme Court No. 27427
Defendant-Appellant.	)	

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Michael Gerald Vandenberg, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Oregon Supreme Court denying appellant's Petition for Rehearing in the above captioned matter.

The opinion of the Court of Appeals was entered on October 6, 1980. Appellant's Petition for Review was denied by the Oregon Supreme Court on February 4, 1981. Appellant's Petition for Rehearing was denied by the Oregon Supreme Court on March 17, 1981.

This appeal is taken pursuant to 28 USC Section 1257(2).

Jossi Davidson
Attorney for Defendant-Appellant
108 S. Water Street
P. O. Box 565
Silverton, Oregon 97381

Telephone: (503) 873-5366

CERTIFICATE OF SERVICE

I, Jossi Davidson, hereby certify that on this 15th day of June, 1981, the foregoing Notice of Appeal to the Supreme Court of the United States was served upon the following people by mailing them a true copy thereof via first class mail with postage prepaid to the following addresses:

William F. Gary
Solicitor General
100 State Office Building
Salem, Oregon 97310
Attorney for State of Oregon

Richard M. Botteri
1215 Oregon National Building
610 S. W. Alder Street
Portland, Oregon 97205
Attorney for John Vandenberg

Jossi Davidson
Attorney for Appellant

Filed this 15th day of June, 1981, in the Supreme Court of Oregon.

No. 80-6878

RECEIVED
JUL 14 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ORIGINAL COPY

MICHAEL GERALD VANDENBERG,

Appellant,

v.

STATE OF OREGON, ex rel JOHN VANDENBERG,

Appellee.

ON APPEAL FROM
THE OREGON COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

RICHARD M. BOTTERI
Attorney at Law
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Portland, Oregon 97205
Telephone: (503) 224-9675

Attorney for Appellee

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 80-6878

MICHAEL GERALD VANDENBERG, Appellant,

v.

STATE OF OREGON, ex rel JOHN VANDENBERG, Appellee.

ON APPEAL FROM
THE OREGON COURT OF APPEALS

The appellee John Vandenberg respectfully moves to dismiss or affirm the judgment of the Oregon Court of Appeals in this case. Rule 16(1)(c) and (d).

QUESTIONS PRESENTED

1. Is an appeal timely filed in the United States Supreme Court which is filed more than 90 days after the issuance of a final judgment by the highest state appellate court having jurisdiction of the appeal?

2. Does appellant present a substantial federal question when the statutory procedure he challenges has been repealed?

3. Does appellant present a substantial federal question when the statutory procedure for civil commitment which he

challenges provides for impartial and detached professional evaluation of the individual to be committed, trial court review and representation by counsel, explicit statutory and administrative standards for determination of mental deficiency, and a requirement of evidence beyond a reasonable doubt?

4. Should a decision be affirmed which shows the challenged statutory commitment procedure meeting the due process requirements established by the United States Supreme Court and reaches this conclusion on uncontradicted evidence in the record of appellant's mental retardation and need for institutional care?

STATUTES AND ADMINISTRATIVE RULES INVOLVED

In addition to the constitutional provisions and statutes noted by appellant, appellee sets forth the following statutes:

Ore.Rev.Stat. 2.516

> "Except where original jurisdiction is conferred on the Supreme Court by the Constitution of Oregon or by statute, the Court of Appeals shall have exclusive jurisdiction of all appeals."

Ore.Rev.Stat. 2.520

> "Any party aggrieved by a decision of the Court of Appeals may petition the Supreme Court for review within 30 days after the date of the decision, in such manner as provided by rules of the Supreme Court."

Former Ore.Rev.Stat. 427.035

"Upon receipt of an application as provided in ORS 427.025, the acceptable facility or institution or Fairview Hospital and Training Center, whichever has been requested to make the examination, shall schedule a date for the person alleged to be mentally deficient to be brought to the facility or institution or Fairview Hospital and Training Center for examination. The person shall not be kept in residence for a period longer than seven days."

Former Ore.Rev.Stat. 427.062

"(1) If the allegedly mentally deficient person, when brought before the court, requests the assistance of counsel to represent him at the proceedings provided for by ORS 427.015 to 427.059, the court shall give such person opportunity to obtain such legal counsel. If no such request is made by the allegedly mentally deficient person, his legal guardian, relative or friend may, in the order named, request assistance of legal counsel. If no request for legal counsel is made, the court may, at its discretion, appoint legal counsel.

(2) If the person is indigent, the court may provide by order for payment of an attorney fee by the county of residence of the allegedly mentally deficient person. The attorney fee shall be fixed by the court and shall be paid on the same basis as fees for attorneys appointed in criminal cases from the circuit court. In all cases such legal counsel shall be present at the hearing and examination and may examine all witnesses offering testimony, and otherwise represent such person.

(3) Where legal counsel is requested or provided, the court may continue the hearing for up to 72 hours after the request or appointment and may make such orders for the care and custody of the person during that period as it deems necessary."

Current Ore.Rev.Stat. 427.020

"(1) State training centers shall annually review the plan of care for each resident and certify the resident's eligibility and need for continued residential care and training and shall present each certification with clear and convincing justification for continued residential care and training to the State Training Center Review Board for review and action pursuant to this section. If the board does

not approve of the certification or, if the resident objects to continued residential care and training, the resident shall be released pursuant to ORS 427.300 or, if the division considers release not to be in the best interest of the resident, the superintendent of the state training center where the person is a resident shall initiate commitment proceedings pursuant to ORS 427.235 to 427.270, 427.280 and 427.285. The board may require the physical presence of any resident during the review. However, the board shall require the physical presence of each resident at least once every three years of residence in a state training center.

(2) The plan of care for each resident shall include, but not be limited to, the following:

(a) Current diagnosis;

(b) Level of functioning;

(c) Current habilitation and health programs in which the resident is participating;

(d) Statement as to continued eligibility and continued need for residential care;

(e) Statement of long-term and short-term goals for the resident; and

(f) Verification that the person has been advised of the facility's statement of rights and the policies governing his immediate living area.

(3) The state training center shall notify the resident orally. In addition, the resident, the resident's parent, guardian or person entitled to custody shall be notified by certified mail of the intent to certify the need for the resident's continued commitment. The notification shall include the following:

(a) Time, place and location of the hearing of the State Training Center Review Board;

(b) Explanation of the possible consequences of the proceedings; and

(c) Explanation of the resident's right to appear before the board on the resident's own behalf or to be represented at the proceeding by the resident's parent, guardian, the person entitled to custody or other person, including counsel, of the resident's choosing.

(4) In the event the resident, because of severe disability, is unable to receive and acknowledge the communication required by subsection (3) of this section, that fact shall be documented in the resident's record and conveyed to the board."

Oregon Rule of Appellate Procedure 10.10

"The petition for review in the Supreme Court shall serve as the petition for reconsideration in the Court of Appeals.

The Court of Appeals first will determine whether it will reconsider the case. Upon making that decision the court will enter an order evidencing such determination and transmit a copy of such order to the Supreme Court and to the parties of record.

If the Court of Appeals decides to reconsider, it may do so with or without oral argument and it may issue a modified or supplemental opinion or adhere to its former decision and opinion.

The petition for review to the Supreme Court will remain in abeyance until the Court of Appeals renders its decision and order on the petition.

....

If the Court of Appeals denies reconsideration, the Supreme Court will proceed to determine whether to grant review." ....

Oregon Rule of Appellate Procedure 10.20

"A party seeking to challenge an opinion of the Supreme Court shall do so by filing a petition for rehearing."

Appellant's quotation of OAR 309-42-000 is incomplete.

The full relevant text is:

"(1) Purpose. This rule prescribes criteria for voluntary admission to a state institution for the mentally retarded and criteria for the examining authority's recommendation to a court on commitment of a person alleged to be mentally retarded to the Mental Health Division. This rule also prescribes a procedure for the release of certain residents from state institutions for the mentally retarded.

(2) Statutory Authority and Procedure. This rule is authorized by ORS 430.041)1) and carries out the provisions of ORS Chapter 427.

(3) Definitions. As used in this rule:

(a) "Division" means the Mental Health Division of the Department of Human Resources.

(b) "Examining authority" means the Diagnosis and Evaluation Service of the Mental Health Division or any facility designated by the Diagnosis and Evaluation Service to act as an examining authority for the purpose of this rule.

(c) "Mental retardation" means significantly subaverage general intellectural functioning existing

concurrently with deficits in adaptive behavior and manifested during the developmental period. Persons of borderline intelligence may be considered mentally retarded if there is also serious impairment of adaptive behavior. Definitions and classifications shall be consistent with the "Manual on Terminology and Classification in Mental Retardation" of the American Association on Mental Deficiency, 1977 Revision. Mental retardation is synonymous with mental deficiency:

(A) "Adaptive behavior" means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for age and cultural group.

(B) "Developmental period" means the period of time between birth and the 18th birthday.

(C) "Intellectual functioning" means functioning as assessed by one or more of the individually administered general intelligence tests developed for that purpose.

(D) "Significantly subaverage" means a score on a test of intellectual functioning that is two ore more standard deviations below the mean for the test.

....

(4) Admission Criteria. Before the name of a person whose application form has been approved is placed on the waiting list for admission to a state institution for the mentally retarded, or before an examining authority may recommend to a court the commitment of an allegedly mentally retarded person to the Mental Health Division, the Diagnosis and Evaluation Service of the Division shall determine that:

(a) An examining authority has found the person to be mentally retarded based upon the "Manual on Terminology and Classification in Mental Retardation" of the American Association on Mental Deficiency, 1977 Revision, including a comprehensive evaluation covering physical, social, and cognitive factors and considering past and present behavior of the person. In addition to those persons' meeting the AAMD definitions, the manual allows that persons who score in the borderline range (IQ 70-79) on tests of intellectual functioning may be diagnosed mildly retarded if their adaptive behavior is in the retarded range, unless the examiner can definitely attribute the adaptive deficits to such factors as mental or emotional disturbance, sensory impairments, or other such variables.

(b) Admission to a state institution for the mentally retarded is determined to be the optimal available plan and is in the best interest of the person and the community. The Diagnosis and Evaluation Service may not make such a determination unless:

(A) Program and services needed by the person are available in a state institution for the mentally retarded;

(B) Space is available or may become available within a reasonable time in an appropriate unit of a state institution for the mentally retarded; and

(C) The Diagnosis and Evaluation Service has documented that the person cannot be maintained in the community because of severe behavioral or medical conditions, or that there are no appropriate community programs to meet the person's training, maintenance, or residential needs." ....

STATEMENT OF THE CASE

In his statement of the case, appellant states that the trial court made no finding that appellant was "unable to care for himself, nor did the evidence support such a finding." This is a complete distortion of what was found by the trial court judge.

The evidence showed that Michael Vandenberg had been diagnosed as mentally retarded by a physician, a psychiatrist, and two psychologists. He suffers from a large, progressive, infiltratin/lesion of the brain which manifests itself with grand mal epileptic seizures. These seizures threaten Michael Vandenberg with death if they are not controlled. They are controlled by daily dosages of phenobarbitol and dilantin.

Michael's intelligence level and his behavioral history indicate that he is not able to take care of his medical needs

on his own. Appellant's father, John Vandenberg, is a physician of long standing and testified regarding his son's medical condition. Dr. Vandenberg's testimony showed a long history of progressive retardation and epileptic seizures resulting from the brain lesion suffered by his son. The problems presented by the progressive deterioration resulting from the lesion eventually forced the appellant's parents to commit him. On at least three occasions prior to his eighteenth birthday, appellant was diagnosed as being retarded.

Since his commitment in 1976 appellant has shown no improvement in his physical capacities, the organic brain lesion continues to grow, and he has shown less capacity to accept responsibility for his medication as time went by. As a physician, Dr. Vandenberg testified that he believed his son did not have the ability to properly administer the medication to himself in the future. This diagnosis was confirmed by the chief medical officer of the institution where Michael was committed.

In 1978 when appellant reached the age of majority the institution was required by former Ore.Rev.Stat. 427.250 to evaluate him to determine whether he was in need of further residential treatment, training or education. Despite a divided opinion at the institution, the superintendent concluded that Michael should be released. This resulted in a hearing before a trial court at which the testimony was in dispute as

to whether appellant was retarded and in need of care. The trial judge stated that if he had the authority he would have "gone on and I would have certified and committed Michael." However, because the institution's administration had stated that Michael was not eligible for continuing services, the judge ruled that he was compelled to discharge appellant from the institution. He however stated specifically that he made no determination as to the mental condition of the appellant.

After this first hearing, appellant was released from the institution and was admitted to a group home. The testimony of the administrator of the group home detailed a series of behavioral problems suffered by appellant. The testimony showed that he eventually ran away from the group home and was found in the street having a grand mal seizure.

This last episode caused his father to file a petition to commit his son to Oregon's Mental Health Division. A precommitment physical and mental examination was carried out pursuant to court order. The report concluded that appellant has an intellectual disability which is commonly associated with organic brain damage, that his adaptive behavior is impaired and that he is mentally retarded and that he is eligible for continued services at the institution. The report was done with reference to the standards of the American Association of Mental Deficiency as set forth in the administrative rule of the Oregon State Mental Health Division, OAR 309-42-000.

In view of this latest analysis of appellant's mental condition and the evidence that he was unable to care for himself while outside the institution, the institution's administration admitted that it had been in error as to its previous conclusion about appellant's condition and stated that it supported his recommitment.

At the end of testimony at the second hearing the trial judge concluded that, based on all the testimony, he found that appellant was mentally retarded and should be committed until he had received sufficient training to go back into the community. The trial judge made his decision concluding that the evidence was "beyond a reasonable doubt."

Appellant presented no significant evidence to contradict the evidence of the appellee that Michael Vandenberg is mentally retarded and in need of institutional care.

The trial court's Order was issued on August 14, 1979. A Notice of Appeal to the Oregon Court of Appeals was filed on September 13, 1979. The Oregon Court of Appeals issued its decision on October 6, 1980. The decision affirmed the trial court's order of commitment.

On November 4, 1980 appellant filed a Petition for Review in the Oregon Supreme Court asking for review of the Court of Appeals decision. The Oregon Supreme Court denied the Petition for Review on February 4, 1981. The Oregon Court of Appeals issued its Judgment and Mandate affirming the trial court order on February 26, 1981.

Appellant filed a Motion for Rehearing in the Oregon Supreme Court on March 6, 1981, which the Supreme Court denied on March 17, 1981.

Appellant filed this Appeal on June 15, 1981.

Subsequent to the trial court's order the statutes under which appellant was committed were repealed. They were replaced by a new statutory scheme, current Ore.Rev.St. Chapter 27, which provides for annual review of appellant's case. If he should demand dismissal from the institution, he would have to be discharged unless a new commitment proceeding is started. Appellant has never demanded dismissal under the new statute.

MOTION TO DISMISS

1. This appeal was not timely filed in the United States Supreme Court.

A final judgment, for purposes of 28 USC §1257(2) has existed in this case since February 26, 1981. On that date, the Oregon Court of Appeals issued its Judgment and Mandate affirming the decision in the trial court. (It is important to note that appellant makes no mention of this judgment in his jurisdictional statement. A copy is provided in the Appendix to this Motion.) The mandate was issued after the Court of Appeals had rendered its opinion on October 6, 1980 and the Oregon Supreme Court had denied appellant's Petition for Review of the Court of Appeals' opinion on February 4, 1981.

The issuance of the Court of Appeals Judgment and Mandate on February 26, 1981 was the final step in the appeals process.

Pursuant to U. S. Supreme Court Rule 12.1, appellant had 90 days "after the entry of the judgment appealed from", i.e., until May 26, 1981, to file his appeal in the United States Supreme Court. This appeal was not filed until June 15, 1981, almost a month late.

The operative date from which appellant calculates the time for filing the appeal is March 17, 1981, when the Oregon Supreme Court denied appellant's Petition for Rehearing of its refusal to review the Court of Appeals decision. Under Oregon procedure, however, the judgment has already been entered. Appellant's application for reconsideration was a nullity.

Ore.Rev.Stat. 2.516 provides that the Oregon Court of Appeals shall have exclusive jurisdiction of all appeals. Ore. Rev.Stat. 2.520 provides that any party aggrieved by the decision of the Court of Appeals may petition the Supreme Court for review within 30 days after the day of the decision "in such manner as provided by the rules of the Supreme Court". Rule 10.10 of the Oregon Rules of Appellate Procedure provides that when a petition for review is filed, the Oregon Court of Appeals also automatically determines whether it will reconsider the case. The Petition for Review to the Supreme Court remains in abeyance until the Court of Appeals decides whether to reconsider.

In this case, appellant filed his Petition for Review on November 4, 1980. The Oregon Court of Appeals did not reconsider the decision. Thereafter, on February 4, 1981, the Oregon Supreme Court issued its order denying the Petition for Review.

On February 26, 1981 the Court of Appeals issued its Judgment and Mandate. It was not until 10 days later, March 6, 1981 when appellant filed a Petition for Rehearing in the Oregon Supreme Court.

There is no provision in Oregon practice for a rehearing of a Supreme Court order denying a petition for review. Oregon Appellate Rule 10.20 only provides for rehearing in the Supreme Court when a party seeks "to challenge an opinion of the Supreme Court." (emphasis added). Apparently, the Oregon Supreme Court treated appellant's Petition for Rehearing as if it was a petition for reconsideration and denied it.

The Oregon Supreme Court had earlier declined to take jurisdiction of the case by refusing to review the Court of Appeals opinion. Consequently, jurisdiction of the appeal remained with the Oregon Court of Appeals pursuant to Ore.Rev. Stat. 2.516. The Court of Appeals' issuance of its Judgment and Mandate prior to the application for rehearing in the Oregon Supreme Court brings the appeal to an end.

The United States Supreme Court's opinion in Market Street Railway Company v. California Railroad Commission, 324 US 548, 65 SCt 770,LEd 1171 (1945) supports appellee's position. There, the California Supreme Court had rendered an opinion on July 1, 1944, and denied a petition for review on July 27, 1944. A California procedure also provided that the judgment would become final 30 days after filing unless otherwise ordered prior to the expiration of said 30 day period. On August 1, 1944, the California Supreme Court certified the July 1 judgment.

The issue was when the California judgment was final for purpose of the statute which is the predecessor to 28 USC §2157. Justice Jackson stated:

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a late power in the rendering court to reopen or revise its judgment. The waiting period prescribed by the statute here seems to reserve a power of that character. The decision during this period does not lack the attributes of an adjudication, it is not a waiting lapse of time to become a judgment, it is merely subject to modification.
>
> ....our test is a practical one. When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired as here it would appear to do at the end of the 30 day period.
>
> .....we hold that this judgment became final on denial of rehearing, ..." 324 US 551-552

Under the standard of Market Street Railway, the judgment was probably final in this case on February 4, 1981 when the Oregon Supreme Court denied the Petition for Review and was certainly final on February 26, 1981, when the Oregon Court of Appeals issued its Judgment and Mandate.[1] As of that point the Oregon Court of Appeals, the highest court in Oregon with jurisdiction of the appeal, had finally decided the federal question. The appellant was not able to destroy finality by subsequently asking the Oregon Supreme Court to reconsider the matter in a fashion not authorized by Oregon appellate procedure.

---

[1] Incidentally, this appeal should be treated as an appeal from the Oregon Court of Appeals which issued the judgment, not from the Oregon Supreme Court.

2. This appeal does not present a substantial federal question.

A. The statutes appellant challenges have been repealed.

Appellant is no longer held in the Oregon institution pursuant to the statute which he challenges on this appeal. He was originally committed pursuant to former Ore.Rev.Stat. 427.015 et seq. Those statutes were repealed in 1979 subsequent to the trial court's order, and a new procedure was adopted in Oregon for commitment of mentally retarded persons. The most important aspect of the new procedure is Ore.Rev.Stat. 427.020. Appellant remains in the Oregon institution pursuant to this statute which appellant does not challenge.

Ore.Rev.Stat. 427.020 provides for an annual review of a plan of care for each institutional resident that has been developed for his instruction and care. During each annual review the need for continued residential care and training must be established with "clear and convincing justification" to the State Training Center Review Board. If the Board does not approve of a certification for continued residential care and training, or, if the resident objects to continued residential care and training, the resident then will be released. However, if the Mental Health Division considers release not to be in the best interests of the resident, the superintendent of the state training center where the person is a resident must initiate commitment proceedings. The resident has the

right to counsel in a hearing before the State Training Center Review Board and also has a right to court appointed counsel in any commitment procedure begun by the superintendent of the institution where he resides.

At the time this appeal was commenced in the Oregon courts, the new procedure for annual review had not yet taken up appellant's case. Since the passage of the new statutory scheme, however, there has been opportunity for at least two annual reviews of appellant's condition. There is no record that appellant has ever objected to the State Training Center Review Board to his continued residence in the state institution. Should he ever object in the future, he would be automatically entitled to a new civil commitment hearing.

In effect, this appeal is moot, because appellant can be retained in the institution against his will only if a new civil commitment procedure is initiated by the Mental Health Division.

B. Parham v. J. R., 442 US 584, 61 LEd2d 101 (1979) adequately covers the issues raised by the appeal.

Appellant challenges the procedural standards for civil commitment in Oregon of mentally defective persons. In Parham, a Georgia statute allowed for a determination by the superintendent of each mental institution as to whether a child showed evidence of mental illness and should be admitted. There were no administrative regulations defining procedures the superintendents should use in making such determination. The Court

approved the Georgia procedure because it provided for determination of mental illness by professionals who are "neutral and detached." 61 LEd2d 127.

Oregon requires strict construction of its civil commitment statutes. State v. O'Neil, 274 Or 59, 55 P2d 97 (1976). Strict construction of Oregon's former civil commitment procedure at issue in this case shows that the procedure passes all due process tests.

Former Ore.Rev.Stat. 427.015 et seq, the statutes under which appellant was committed, did not exist in a vacuum, creating a vague and overbroad commitment procedure. The statutes were amplified by specific, detailed administrative rule. OAR 309-42-000. Nearly all of the evaluations of appellant showing that he is mentally retarded and has insufficient social adaptation were conducted with reference to the definitions and procedures set forth in this rule.

The administrative rule modifying the statute provides a detailed definition of mental retardation, which by its very nature requires that the commitment statutes by "strictly construed." Both former Ore.Rev.Stat. 427.015 and the rule look to whether the individual is in need of care. The rule provides for examination by a regularly constituted authority. Former Ore.Rev.Stat. 427.059 required court review of an examination finding the person mentally deficient and in need of care, and former Ore.Rev.Stat. 427.062 provided the individual with legal counsel. (Appellant had a hearing in this

case and was represented by counsel.) Hence, examination by "impartial and detached observers" was ensured, and the uncontrolled discretion that appellant fears did not exist.

The evidence at the trial court established that appellant is not only mentally retarded, but is unable to care for himself outside of the confines of the institution to which he has been committed. His principal problem, among many, is an inability to properly administer medication to himself which must be taken on a daily basis to prevent life-threatening grand mal seizures. In fact, his present commitment was mctivated in large part by his inability to adapt to life in a group home away from the institution, his running away, and eventually being found lying in a street suffering a seizure.

Oregon's formal civil commitment procedure met the standards of Parham v. J. R., supra, and also followed the fundamental rules of inquiry required in civil commitment procedures by O'Connor v. Donaldson, 422 US 563, 95 SCt 2486, 45 LEd2d 396 (1975). In O'Connor, the Court held that a state may not commit a mentally ill person without evidence that such a person is dangerous or is not capable of surviving safely in freedom by himself or without the help of other willing persons. In this case, the record was replete with evidence that appellant is unable to survive safely outside the confines of the institution where he has been committed.

Appellant attacks the materiality of Parham v. J. R.,

asserting that the decision dealt with a "voluntary" commitment. However, in that case, the party challenging Georgia procedure was a child who had been committed by his parents. The child had not entered the institution voluntarily. Appellant, as plaintiff in Parham, is a person who has been willingly committed by his parent in order to guarantee his care and survival.

In view of the fact that evidence has been found that appellant cannot survive outside the institution, is mentally retarded, and had legal counsel representing him at a hearing at which the evidence of mental retardation and necessity for commitment were fully litigated, the standards of Parham v. J. R. and O'Connor v. Donaldson, supra, have been met. Appellant presents no reason why those standards need additional amplification in this appeal.

C. Res judicata and double jeopardy issues do not raise substantial federal questions.

In the appeal to the Oregon Court of Appeals, appellant contended that the principals of double jeopardy and res judicata should apply. His complaint stemmed from a trial court hearing previous to the one which had resulted in his commitment. Appellant contended that the decision in the first court hearing to release him was res judicata as to any subsequent commitment procedure and the subsequent commitment procedure resulted in double jeopardy.

The previous court hearing in fact never resulted in a

judgment regarding appellant's mental deficiency. In fact, the trial judge specifically refrained from making a determination as to mental deficiency but released appellant because, at that time, the state institution did not feel appellant was in need of care. Under then existing procedure, the Court had no authority to make any further inquiry.

Res judicata does not present a federal constitutional question. While double jeopardy may present a federal constitutional question, it is an issue which is only applicable to criminal or contempt procedures and not to civil commitment procedures. Cf. State v. O'Neil, supra, 274 Or at 72.

In essence, appellant contends that once there has been one civil commitment proceeding, there can be no other. However, the general rule is as stated by the Texas Court of Civil Appeals in Timon v. Timon, 244 SW2d 990 (1951):

> "An adjudication regarding mental capacity at a particular time is conclusive on the question of a party's mental capacity at that time, but it is not conclusive as to matters not connected with the immediate purpose and scope of the proceeding, and although it may be admissible as evidence, it is not conclusive evidence of mental capacity at a subsequent time."

Originally, the institution thought that appellant could survive outside. The subsequent events proved that the administration was wrong and it so admitted in the second commitment hearing. To accept appellant's argument is to deny all future aid to retarded persons released from commitment by the state. The state must be allowed to recommit a retarded individual

when subsequent facts show that he should be committed for his own well being.

MOTION TO AFFIRM

The record establishes that Oregon's former civil commitment procedure met substantive due process requirements of the United States Supreme Court. The standards can be summarized as follows:

(a) The person being committed must be shown as dangerous or not capable of surviving safely in freedom by himself. O'Connor v. Donaldson, 422 US 563, 95 SCt 2486, 45 LEd2d 396 (1975);

(b) The procedure for commitment requires review by professionals who are "neutral and detached," and commitment must not occur through unbridled discretion. Parham v. J. R., 442 US 584, 99 SCt 2493, 61 LEd2d 101 (1979);

(c) The evidence used to commit the individual must be "clear and convincing". Addington v. Texas, 441 US 418, 99 SCt 1804, 60 LEd2d 323 (1979).

The evidence showed that Michael Vandenberg had been found mentally deficient by five professionals. The evidence, undisputed at the trial court level, was that he had been unable to reside outside of the institution safely and failed to take medication which was necessary to prevent life threatening grand mal seizures.

Appellant was committed pursuant to a procedure which required professional examination with reference to a carefully defined administrative rule setting forth the standards for determination of mental retardation and of ability to exist outside an institutional setting. The procedure also provided for formal court review of such findings with appellant represented by counsel.

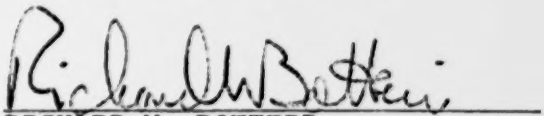
The trial judge found that appellant was retarded and needed institutional care "beyond a reasonable doubt." The Oregon Court of Appeals reviewed the record and confirmed the trial judge's decision. The evidence, not seriously contested by appellant either at trial or on appeal showed that the three necessary elements for commitment required by OAR 309-42-000(3)(c) had been found by evidence beyond a reasonable doubt: (1) a significantly sub-average performance on general intelligence tests, (2) a failure to meet the standards of personal independence and social responsibility expected for the age and cultural group of the individual, and (3) manifestation of these conditions during the time period before the subject's eighteenth birthday.

The Oregon Court of Appeals has adequately considered the federal questions in this case and has properly ruled to affirm the trial court's decision.

CONCLUSION

This appeal should be dismissed as not having been timely filed, or, in the alternative, for having failed to present a substantial federal question. In the further alternative, the decision of the Oregon Court of Appeals should be affirmed as having properly determined the federal questions presented.

Respectfully submitted,



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APPENDIX

FEB 27 1981

STATE OF OREGON

COURT OF APPEALS

COPY

In the Matter of Michael Gerald Vandenberg, Alleged to be Mentally Deficient.	)	JUDGMENT and MANDATE
STATE OF OREGON ex rel JOHN VANDENBERG,	)	Appeal from MARION County Circuit Court
Respondent,	)	No. 1158 CA 15533
v.	)	
MICHAEL GERALD VANDENBERG,	)	
Appellant.	)	

This cause having come on to be heard on appeal and having been duly submitted and considered, and petition for review having been denied by the Supreme Court on February 4, 1981:

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below in this cause is affirmed.

The cause is returned below for entry of judgment pursuant to law and the opinion and order of the court entered October 6, 1980.

ISSUED at Salem, Oregon:

STATE OF OREGON,)
County of Marion.)

I, ELIZABETH D. BELSHAW, State Court Administrator for the State of Oregon, do certify that this copy of ORDER is a correct transcript of the originial, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this _____.

ELIZABETH D. BELSHAW
State Court Administrator

by _____
Deputy Administrator